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IN THE

Supreme Court of the United States

October Term, 1963

No. 792

HILTON HOTELS, CORPORATION, ALLEGHENY HOTEL CORPORATION, SHERATON MID-CONTINENT CORPORATION,
Petitioners,

v.

ROBERT C. WEAVER, Administrator of the Housing and Home Finance Agency, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement	3
History of the Litigation	8
(a) Pittsburgh Suit	8
(b) The Present District of Columbia Suit	9
Reasons for Granting the Writ	11
Conclusion	25

Appendix:

A. Opinion of the Court of Appeals in the Instant Case	1a
B. Order of the District Court in the Instant Case	2a
C. Opinion of United States Court of Appeals for the Third Circuit in *Pittsburgh Hotels Association, Inc.* v. *Urban Redevelopment Authority of Pittsburgh*	3a

INDEX OF CITATIONS

Cases:

Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912)	10
FHA v. *The Darlington, Inc.*, 358 U.S. 84 (1958)	12
Gart v. *Cole*, 263 F.2d 244 (2nd Cir.), *cert. denied*, 359 U.S. 978 (1959)	22, 24

Page

General Heating Engineering Co. v. *District of Columbia*, 301 F.2d 549 (D.C. Cir. 1962) 10

Harrison-Halsted Community Group, Inc. v. *HHFA*, 310 F.2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963) 25

Keokuk & W. R. Co. v. *Missouri*, 152 U.S. 301 (1894) .. 10

Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 (1955) 10

Mast, Foos & Co. v. *Storer Mftr. Co.*, 177 U.S. 485 (1900) 21

Pittsburgh Hotels Association, Inc. v. *Urban Redevelopment Authority of Pittsburgh*, 309 F.2d 186 (3rd Cir. 1962), *cert. denied*, 372 U.S. 916 (1963) 2

Taft Hotel Corp. v. *HHFA*, 262 F.2d 307 (2nd Cir. 1958), *cert. denied*, 359 U.S. 967 (1959) 17

Texas & Pac. Ry. Co. v. *Rigsby*, 241 U.S. 33 (1916) .. 22, 24

United States v. *Pink*, 315 U.S. 203 (1942) 10

STATUTES:

Administrative Procedure Act, Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. § 1009 2

Judicial Code, Act of June 25, 1948, c. 646:

§ 1254(1); 62 Stat. 928, 28 U.S.C. § 1254(1) 2
§ 1291, 62 Stat. 929, as amended, 28 U.S.C. § 1291 2
§ 1294, 62 Stat. 930, as amended, 28 U.S.C. § 1294 2
§ 1331, 62 Stat. 930, as amended, 28 U.S.C. § 1331 2
§ 1391(e), 76 Stat. 744, 28 U.S.C. § 1391(e) (Supp. IV, 1963) 13

Housing Act of 1949, Act of July 15, 1949, c. 338:

§ 106(c)(1), 63 Stat. 418, 42 U.S.C. § 1456(c)(1) .. 2, 3
§ 110(b), 63 Stat. 420, as amended, 42 U.S.C. § 1460(b) 4

Housing Act of 1954, Act of August 2, 1954, c. 649:

§ 311, 68 Stat. 626, as amended, 42 U.S.C. § 1460(b) 4
§ 132, 68 Stat. 610, 12 U.S.C. § 1731b(a) 12

Page

Housing Act of 1956, Act of August 7, 1956, c. 1029:
§ 302, 70 Stat. 1097, as amended, 42 U.S.C. § 1460(c) 12

Housing Act of 1959, Act of September 23, 1959:
§ 410, 73 Stat. 674, 42 U.S.C. § 1456(g) (Supp. IV, 1963) 2, 6,

MISCELLANEOUS:

Sen. Rep. No. 715, 86th Cong., 1st Sess., 20 (1959) 19

Sen. Rep., Section-by-Section Summary of the Provisions of S. 57 as Agreed to in Conference, Committee Print, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 11 (1959) 19

H.R. Rep. No. 2359 of the House Committee on Banking and Currency on S. 4035, the Housing Act of 1958, 85th Cong., 2d Sess., 32 (1958) 12

H.R. Rep. No. 1040, 86th Cong., 1st Sess., 18 (1959) .. 19

105 Cong. Rec. 8815 (May 20, 1959) 18

Hearings on H.R. 10157, the Housing Act of 1956 before the House Committee on Banking and Currency, 84th Cong., 2d Sess., 432, 434 (1956) 23

Hearings on Housing Act of 1958 before the Subcommittee on Housing of the House Committee on Banking and Currency, 85th Cong., 2d Sess., 740 (1958) 23

Hearings on Various Bills to Amend the Federal Housing Laws before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 2d Sess., 451 (1958) 23

Hearings on the Housing Act of 1959 before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 1st Sess., 705 (1959) 23

Hearings on Various Bills to Amend the Federal Housing Laws before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 754 (1954) .. 23

Page

Hearings on the President's Message Disapproving S. 57, the Housing Act of 1959 before a Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 577 (1959) 23

Housing and Home Finance Agency. Comments on Numbered Items in Agenda of Senate Committee on Banking and Currency Relative to Housing Act of 1959 (S. 57, S. 612, S. 2378), 86th Cong., IV-3 (July 23, 1959) 19

Attachments to Items in Conference Agenda, Supplemental Statements of HHFA on Administration Positions, Agenda Item No. 48, "Special Provisions to Restrict Hotel Construction on Urban Renewal Sites" (June, 1959) 24

Statement of Robert C. Weaver, Administrator, Housing and Home Finance Agency, Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 126 (April 24, 1961) 24

HHFA Brief in Opposition to Petition for Certiorari, *Harrison-Halsted Community Group* v. *HHFA*, No. 861, October Term, 1962 25

Petition for Writ of Certiorari, *Hilton Hotels Corp.* v. *Urban Redevelopment Authority of Pittsburgh*, No. 761, October Term, 1962 9

Restatement, Judgments (1942) § 93 10
16th Annual Report, HHFA, Table VII-2, (1962) ... 14, 16

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v.

ROBERT C. WEAVER, Administrator of the Housing and Home Finance Agency, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Hilton Hotels Corporation, Allegheny Hotel Corporation, and Sheraton Mid-Continent Corporation, respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted as Appendix A, p. 1a, *infra*. The order of the District Court for the District of Columbia is reprinted as Appendix B, p. 2a, *infra*. The opinion of the United

States Court of Appeals for the Third Circuit in *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F.2d 186 (3rd Cir. 1962), *cert. denied*, 372 U.S. 916 (1963) is reprinted as Appendix C, p. 3a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered November 18, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the District Court for the District of Columbia was invoked pursuant to 28 U.S.C. § 1331; Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009; and Section 106 (c)(1) of the Housing Act of 1949, 63 Stat. 418 (1949), 42 U.S.C. § 1456(c)(1). An actual controversy between appellants and appellee was alleged wherein the matter in controversy exceeds the sum or value of $10,000. Jurisdiction in the court below was founded on 28 U.S.C. §§ 1291 and 1294.

STATUTE INVOLVED

The Housing Act of 1949, as amended, Section 106 (g), Act of September 23, 1959, 73 Stat. 674, U.S.C. Title 42 (Supp. IV, 1963), § 1456(g):

> "(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."

QUESTIONS PRESENTED

1. Does Section 106(g) of the Housing Act, adopted in 1959, require a survey of need prior to the construction of an eight-story hotel which was first proposed to be constructed after the adoption of Section 106(g), even though an urban renewal plan approved prior to the statute incidentally listed "Hotel" among several two-story structures that might possibly be built?

2. When Congress added Section 106(g) to the Housing Act of 1949, requiring urban renewal agencies to secure a competent, independent analysis of the local supply of transient housing, did Congress intend thereby to prohibit the construction of hotels thereafter proposed in all urban renewal areas in the absence of such an analysis?

3. Did Congress add Section 106(g) to the Housing Act of 1949 for the benefit and protection of petitioners and other hotels so that petitioners have standing to obtain judicial review of respondent's disregard of the procedure established by Section 106(g), serious and irreparable injury to them being conceded?

STATEMENT

Petitioners, three corporations owning and operating hotels in Pittsburgh, Pennsylvania,[1] brought suit in the United States District Court for the District of Columbia against respondent, Administrator of the Housing and Home Finance Agency,[2] to enjoin re-

[1] Hilton Hotels Corporation owns and operates the Pittsburgh Hilton Hotel; Allegheny Hotel Corporation owns and operates the Pick-Roosevelt Hotel; Sheraton Mid-Continent Corporation owns and operates the Penn-Sheraton Hotel.

[2] Suits against the Administrator are authorized by Section 106(c)(1) of the Housing Act of 1949, 63 Stat. 418 (1949), 42 U.S.C. § 1456(c)(1).

spondent from continuing his approval of the Government-subsidized construction of a hotel in a Pittsburgh urban renewal area. The gravamen of the action is that respondent concededly has failed to observe the statutory requirement that an independent survey be made demonstrating a need for new hotel rooms before authorizing the construction of a hotel in an urban renewal area. It was alleged in the complaint and admitted for present purposes that petitioners will be seriously and irreparably injured by the respondent's action in failing to cause the survey to be made.

In June, 1955, the Pittsburgh City Planning Commission prepared an urban renewal plan[3] for the redevelopment of part of the Lower Hill District of the City of Pittsburgh, an area adjacent to the central business district of the city, where petitioners' hotels are located. The plan, merely a tentative outline of possible development, consisted of a map and accompanying text.

The map showed the boundary lines of the project and proposed and existing cross streets. Parts of the map were cross-hatched in different designs to indicate, according to a key, "parking," "residential," "cultural, recreational, educational," and "commer-

[3] This plan was originally known as a "Redevelopment Area Plan" but it will be referred to herein as the "urban renewal plan" or the "renewal plan." Section 110 of the Housing Act of 1949, 63 Stat. 420 (1949), originally provided for a "Redevelopment Plan." This section was subsequently amended by § 311 of the Housing Act of 1954 to provide for an "Urban Renewal Plan" 68 Stat. 626 (1954), as amended, 42 U.S.C. § 1460(b). The differences between the definitions of "Redevelopment Plan" and "Urban Renewal Plan" are not significant for present purposes and the phrase "Urban Renewal Plan" conforms to present usage under the Act.

cial" areas. One area of several acres, bore the "commercial" design and was bisected by a 60-foot wide thoroughfare named Chatham Street.

In the text of the plan accompanying the map the land use labeled "commercial" was defined as follows: "(a) The permitted land uses and buildings shall be the following: Automobile sales agency; Art and antique shop; Business College or Private School; Financial Institution; Hotel; Interior decorating shop; Library; Museum; Music conservatory or studio; Office, business or professional; Radio or television broadcasting station (without tower); Restaurant; Studio, artist; Theatre or Cinema; Wholesale merchandise establishment or brokerage, and accessory uses and buildings for any of the foregoing.". (The definition was apparently a standard clause used in plans prior to the adoption of Section 106(g) in 1959).[4]

The inclusion of the word "Hotel" in this list between "Financial Institution" and "Interior decoratting shop" was the *only* reference to hotels in the entire plan.

On the spot where it is now proposed to build an eight-story hotel, the plan limited the height of any building to be constructed to "two stories or twenty feet," and described a 60-foot wide thoroughfare known as Chatham Street. Section J of the plan ex-

[4] The entire plan with its maps and modifications is a voluminous document and is not part of the record herein. Pertinent parts of the plan were lodged with the court below, with the leave of the court. There is no factual dispute about the contents of the plan. The plan is a public document. If a trial is had, petitioners will offer the plan in evidence. But for present purposes, the Court is requested to take judicial notice of the portions of the plan quoted herein.

pressly made it a condition of the plan that it could be modified "at any time" upon approval of the city, the planning commission and the redevelopment authorities.

The renewal plan was approved by the Urban Redevelopment Authority of Pittsburgh (hereafter referred to as the "Authority") and submitted to the Housing and Home Finance Agency as part of an Application for Loan and Grant Contract. In October, 1955, a Loan and Grant Contract was entered into between the Authority and HHFA. The contract approved the renewal plan and expressly contemplated that changes in the plan would be made from time to time.

On September 23, 1959, § 106(g) was added to the Housing Act. 73 Stat. 674, 42 U.S.C. § 1456(g) (Supp. IV, 1963). Consistent with the fundamental purpose of the entire Act, which is to assist sound permanent housing for *residential* use, Section 106(g) was intended to prohibit the construction of hotels in federally subsidized urban renewal areas, except where the project community, under regulations prescribed by the Administrator, "has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."

At no time prior to the addition of § 106(g) to the Housing Act had any negotiations, planning, financing commitment, agreement or option to construct a hotel on any of the property within the renewal plan been undertaken by the Authority.

The renewal plan was modified by Modification No. 1 on March 4, 1957, reducing the width of Chatham

Street from 60 to 44 feet. On September 27, 1960, more than a year after the enactment of § 106(g), the plan was again modified so that Chatham Street was entirely removed from the site of the now-proposed hotel. The two-story height restriction on all buildings at the site of the now-proposed hotel has not yet been modified or removed.

In November, 1960, more than a year after the enactment of § 106(g), two private developers on behalf of themselves and the Golden Triangle Motor Hotel Corporation (subsequently organized by them) made an offer to the Authority for a six-month option to enter into a ninety-nine-year lease for the purpose of redeveloping part of the area with an eight-story motor hotel. Under the offer the hotel will derive important competitive advantages because the cost of the land will be partially underwritten with federal urban renewal funds and because no money is to be paid by the hotel corporation until two years after the exercise of the option. The corporation is to have free use of the land for the first two years. Thereafter, a stated rent is to be paid with the corporation having the right to purchase the parcel at a stated price at any time during the ninety-nine-year term of the lease.

The Authority accepted the offer in December, 1960, and in June, 1961, a Contract for Disposition was signed by the Authority and the Golden Triangle Motor Hotel Corporation granting the corporation the six-month option it requested.

At no time did respondent direct the Authority to make an analysis of the need or lack of need for new hotels in the area as required by § 106(g), nor has such an analysis in fact been made. It was alleged

in the Complaint, and admitted for present purposes, that if such analysis had been made it would have shown that at all times there has existed a surplus of hotel rooms in Pittsburgh.

Notwithstanding that the Authority had failed to make the required analysis of the need for new hotels in the area, on November 20, 1961, the respondent approved the contract for disposition between the Authority and the Golden Triangle Motor Hotel Corporation.

At least as late as the decision of the court below, no construction whatsoever had yet begun on the proposed hotel.

HISTORY OF THE LITIGATION

(a) Pittsburgh Suit

Petitioners and other corporations owning hotels in Pittsburgh, brought suit in the United States District Court for the Western District of Pennsylvania against the Urban Redevelopment Authority of Pittsburgh, the City of Pittsburgh, the Golden Triangle Motor Hotel Corporation and the two private developers to enjoin *the construction* of the proposed hotel.

Respondent was not subject to service of process in the suit and was not a party therein. Respondent was, of course, apprised of the suit and could have appeared in it but did not do so, although repeatedly requested to do so by the plaintiffs in that case.

The District Court dismissed the complaint and the United States Court of Appeals for the Third Circuit affirmed, holding that the plaintiffs there lacked standing to maintain the suit. Moreover, the court stated that even if plaintiffs had had standing to sue, § 106 (g) would not be applicable because it applied only

to hotel *provisions* included in renewal *plans* approved after 1959, whereas prior to 1959, the listing of the word "Hotel" among several possible land uses in the Pittsburgh renewal plan constituted a "provision permitting the new construction of hotels." *Certiorari* was requested and denied by this court on February 18, 1963.[5]

(b) The Present District of Columbia Suit

On February 5, 1963, petitioners filed suit in the District Court for the District of Columbia to enjoin the respondent from *continuing his approval* of the unlawful Government-subsidized construction of the

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[5] The questions presented by the petition for certiorari were distinctly different from the questions presented herein. They were as follows:

"1. Did the local redevelopment authority obtain a contractual right against the United States by reason of approval by a federal agency of an over all redevelopment plan which listed as one of the possible future uses for part of the area designated commercial as 'a hotel', which contractual right could not be effected legally by a later congressional amendment which prohibits a hotel from being constructed unless the community obtains a competent independent analysis of the local supply of transient housing and determines that there is a need for such construction and, where, after the amendment and without obtaining any such analysis, the authority amended its plan to make the area commercial by vacating a street and converting street area into commercial and rezoning height restrictions and entered into a contract for construction of a hotel on said property when no negotiations, planning, financing, commitment, agreement or option to construct said hotel had been entered into prior to the amendment?

"2. Does not the action of the Court of Appeals in affirming an order dismissing the complaint but rendering no decision as to the summary judgment appealed by petitioners create such special circumstances as could be prejudicial to petitioners in later proceedings based on the cause of action so that the decision of the Court of Appeals should be considered as an appealable order and the writ of certiorari granted?" Petition for Writ of Certiorari, p. 3. *Hilton Hotels Corp. v. Urban Redevelopment Authority of Pittsburgh*, No. 761, October Term 1962.

hotel in the Pittsburgh urban renewal area.[6] It was alleged in the complaint, that § 106(g) required a survey of need prior to the authorization of the construction of the hotel in a federally subsidized urban renewal area; that this survey had not been made; that at all times a surplus of hotel rooms existed in the Pittsburgh area, and that petitioners would be seriously and irreparably injured by respondent's unlawful action.

The District Court, citing only the prior Third Circuit decision, granted respondent's motion to dismiss on the ground that "the Court lacks jurisdiction of the subject matter in that plaintiff's lack standing to sue." (App. B, p. 2a) On appeal, the Court of Appeals for the District of Columbia Circuit affirmed. But the court below did not adopt the Third Circuit's view of the law; it did not expressly decide that petitioners lacked standing to maintain the suit.[7] Rather

[6] None of the defendants in the Pittsburgh litigation is a party to this action.

[7] Nor did it rule that petitioners were in any way estopped from maintaining the suit. Respondent's refusal to participate as a party in the Third Circuit litigation prevents him from obtaining any benefit from the Third Circuit decision. According to the Restatement of Judgments, § 93, it is a general rule that a "person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . (b) *is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.*". This Court has repeatedly affirmed the long standing Restatement rule, considering it to be "a principle of general elementary law" that one not bound by a prior judgment may not use it to estop a claim. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 at 127 (1912); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955); *United States* v. *Pink*, 315 U.S. 203 (1942); *Keokuk & W. R. Co.* v. *Missouri*, 152 U.S. 301 (1894). This is also the rule in the District of Columbia. *General Heating Engineering Co.* v. *District of Columbia*, 301 F. 2d 549 (D.C. Cir. 1962).

it ruled that "the interests of comity and the orderly administration of justice" required that it "not attempt to reexamine the matters considered and resolved by the Third Circuit." (App. A, pp. 1a-2a). The court below affirmed the order dismissing the complaint, without examining petitioners' contentions that respondent's approval of the construction of a hotel in a federally subsidized urban renewal area, where admittedly a surplus of hotel rooms existed, was directly contrary to the mandate of § 106(g) of the Housing Act.

REASONS FOR GRANTING THE WRIT

I

The court below has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way in conflict with applicable decisions of this Court and the United States Court of Appeals for the Second Circuit.

a. The Issue Is Important Because of the Great Number of Urban Renewal Projects That May Be Affected

The general policy of all the federal housing acts is to promote the construction of permanent residences, not hotels. Hotel construction is limited under all housing programs administered by respondent and the HHFA. "[T]he basic purpose of the various Government-assisted housing programs" according to Congress, "is to assist sound permanent housing for

residential use."[*] Specifically, Title 1 of the Housing Act of 1949 which governs federal urban renewal, and under which this case arises, expressly limits commercial construction in urban renewal areas and dictates that "financial assistance shall not be extended . . . with respect to any urban renewal area which is not predominantly residential in character and which is not to be redeveloped for predominantly residential uses." 70 Stat. 1097 (1956), as amended, 42 U.S.C. § 1460(c).

This policy was reaffirmed in 1959 by the passage of Section 106(g) requiring a survey of need as a pre-

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[*] For example, the National Housing Act, relating to FHA mortgage insurance, contains the following provision:

> "The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." (68 Stat. 610 (1954), 12 U.S.C. § 1731b(a)).

See also e.g., *FHA* v. *The Darlington, Inc.*, 358 U.S. 84 (1958); H.R. Rep. No. 2359 of the House Committee on Banking and Currency on S. 4035, the Housing Act of 1958, 85th Cong., 2d Sess., 33, 40 (1958):

> "Your committee wishes to call attention to previous declarations by the Congress that the basic purpose of the various Government-assisted housing programs is to assist sound permanent housing for *residential* use. Your committee wishes to reaffirm its intention that the prohibition against transient or hotel use is applicable to all housing programs, whether of an insurance or a loan category, and authorized within the various programs under the Housing and Home Finance Administrator." (Emphasis in original.)

condition to the building of hotels in urban redevelopment projects.[9]

The court below has refused to give effect to this policy of the Congress. That it has done so by an erroneous application of the supposed doctrine of comity is of no consequence. What is of consequence is that the very court in which action in violation of Congressional policy is most likely to be challenged has now effectively defeated the policy of Congress in an important area of legislation.[10]

This decision is, of course, much more consequential than the decision of the Third Circuit in the prior litigation, where a purely local issue was raised, where the Housing Administrator was not a party, and where his authority was not directly challenged.

The decision of the court below not only condones a violation of the rights of the present petitioners in Pittsburgh, but it will also undoubtedly frustrate the declared Congressional policy in a great many other communities throughout the land. Although no statistics are available as to precisely the number of urban renewal plans which correspond exactly to the Pittsburgh plan, it appears that several hundred communities may be affected by the ruling below.

The annual reports of the Housing and Home Finance Agency show that out of a total of 689 urban

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[9] The circumstances leading to the enactment of Section 106(g) are detailed, *infra*, pp. 18-20, 22-24.

[10] Indeed, at the time of the Pittsburgh litigation here involved and until the amendment of § 1391(e) of the Judicial Code, 28 U.S.C. § 1391(e) (Supp IV 1962) on October 5, 1962 it was the only circuit in which litigation could be brought. The practical effect of § 1391(e) in making other courts available is not yet clear.

renewal plans approved at the time of the enactment of Section 106(g), only 26 had been completed. 365 such plans were, like the Pittsburgh plan, "In execution" and 298 plans remained wholly unexecuted, and "In planning."[11]

As late as 1962, according to the HHFA Annual Report, only 86 approved plans had been completed. Most of the remaining hundreds of plans "In execution" and "In planning" will be affected by the decision below. For it appears to have been the usual practice, at least prior to the enactment of § 106(g), to include in each urban renewal plan, as in the Pittsburgh plan, a reference to hotels in the boiler-plate authorization for incidental commercial construction.[12] Each of the presumably several hundred plans containing this authorization raises precisely the same problem presented by the Pittsburgh plan.

The figures of the HHFA report show that in most cases it is many years between the approval of a renewal plan and the commencement of execution. Yet the decision of the Third Circuit, which the court below refused to reexamine, emphasizes only the date of approval of the renewal plan and regards this as

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[11] 16th Annual Report, HHFA, Table VII-2, p. 295 (1962).

[12] There are no published statistics of the Housing and Home Finance Agency on the exact number of plans approved prior to 1959 containing the boiler-plate reference to hotels or the number of communities in which hotel construction may now or later be contemplated. It is therefore not possible to state exactly how many of the 663 communities having approved plans in 1959 in the stage labelled "In planning" or like Pittsburgh "In execution" are affected by the decision below. It seems clear, however, that if not all of such plans then at least a large proportion of them are so affected.

the crucial point. Thus, as in the instant case, if a plan has been approved prior to the enactment of Section 106(g), even with the most rudimentary reference to the prospect of building a hotel, there is no requirement of a survey of need before actually building the hotel. This applies even though in any particular community the consideration of whether a hotel should be built under the approved plan may still today be many years in the future.

Such a ruling, of course, unduly emphasizes the significance of the approval of the plan. For an urban renewal plan, as approved, is no more than a generalized statement of goals as they exist from time to time, sufficient only in details and objectives to warrant the commitment of federal funds. Precise building plans are never a part of the plan at this stage. For example, no one examining the Pittsburgh plan when it was approved in 1955 could possibly have guessed that the hotel now proposed could be built in the area.[13] Significant detailed planning by the local renewal agency and private developers begins only *after* HHFA approval of the tentative plan and the commitment of funds. Actual execution of the plan does not commence until a long time later.

The statistics of the HHFA Annual Report, *supra*, establish clearly that the approval of a renewal plan

[13] The hotel now proposed is not one which might have been built under the plan as it existed prior to the enactment of § 106 (g). The proposed hotel will contain eight stories and will be built on the former site of Chatham Street. But it is evident that until the plan was modified in September, 1960, the area now considered for the proposed hotel comprised a 60-foot wide thoroughfare on which nothing could be built. The two-story height restriction on all buildings in the urban renewal area still has not been removed from the plan.

for a project is only the first step. Thereafter the project enters the stage headed: "In planning." It is only after planning has been completed that the project enters the stage called: "In execution." The figures for 1959 have been shown above. Earlier figures may make this clearer. In the year 1955, for example, 340 urban renewal plans had been approved. Of these, 230 were "In planning", 110 were "In execution," and *none* had been completed."

The Pittsburgh Urban Renewal Plan was approved in 1955, and subsequently modified very substantially. The hotel now authorized was not proposed until 1960. It was not contracted for until 1961. At least as late as the decision of the court below, nothing had been done towards its construction. Nevertheless, the court below has ruled that the proposed construction is not subject to the remedial restrictions of the statute passed more than four years ago. This decision denies the statute practical effect even as to the great mass of construction planned for the first time long after the passage of § 106(g). To give effect to the Congressional policy announced in 1959, the time of approval of the basic underlying plan must be disregarded so that every hotel project not previously contracted for should be subject to the requirement of a survey.

Only this will avoid a misdirection of federal funds allocated for residential housing. As of 1962, the federal government had reserved and outstanding obligations in the amount of $3,014,314,096 for a total of 1,210 urban renewal projects in various stages of planning or execution.[15] If the decision of the court below

[14] 16th Annual Report, HHFA, Table VII-2, p. 295 (1962).

[15] *Ibid.*

is allowed to stand, a not insubstantial portion of these federal funds intended to provide decent residential housing for people in blighted areas will end up subsidizing the construction of luxury hotels. As a result, petitioners and other hotels will face destructive competition from subsidized hotels, surplus and unneeded, which Congress, in enacting § 106(g) clearly intended to prevent.

b. In Enacting the Survey Procedure of § 106(g) Congress Intended to Remedy an Existing Evil and to Conserve Federal Funds for Residential Housing by Preventing the Construction of Unneeded Hotels in Urban Renewal Areas

The fact that the court deciding this issue is the principal one having jurisdiction over the Housing and Home Finance Administrator, and the importance of the Congressional policy which is frustrated here make it further appropriate that this Court grant review.

The history of Section 106(g) clearly establishes the importance which Congress attaches to Section 106(g) and the policy embodied therein.

The declarations of Congressional intent to limit commercial construction set forth above (pp. 11-12) seemed clear. Nevertheless, in *Taft Hotel Corp.* v. *HHFA*, 262 F. 2d 307 (2d Cir. 1958), *cert denied*, 359 U.S. 967 (1959) the Court of Appeals for the Second Circuit refused to prohibit the construction of a large hotel in a federally subsidized urban renewal project and dismissed the complaint of a competing hotel on grounds of standing.

The *Taft* case was decided on December 31, 1958. The following May the Chairman of the House of Rep-

resentatives' Subcommittee on Housing introduced an amendment to the Housing Act in an obvious attempt to correct legislatively the result reached in the *Taft* case. In four months the bill was enacted into law as § 106(g).

It was clearly the intent of Congress in § 106(g) to prevent the *construction* of *unneeded* hotels in federal urban renewal areas by conditioning respondent's approval of such hotel construction on proof of actual need. This proof was to be in the form of a "competent independent analysis of the local supply of transient housing [showing] that there exists in the area a need for additional units of such housing." This intent is unmistakably revealed by the comments of those most responsible for the legislation:

(1) Congressman Albert Rains, Chairman of the Subcommittee on Housing of the House of Representatives submitted § 106(g) as a floor amendment,[16] stating that it would require:

> "a survey to be made before a new hotel could be *built* in an urban renewal area."[17]

(2) The Senate Conference Committee in accepting § 106(g), reported that it would:

> "prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of the local supply of such housing

[16] The provisions which now appear as § 106(g) were inserted into the first housing bill considered by Congress in 1959 and were carried along with only minor modification in every subsequent proposed bill until enacted. The comments printed herein are thus references to sections in various proposed bills all of which are identical to § 106(g) as enacted.

[17] 105 Cong. Rec. 8815 (May 21, 1959). Emphasis added through brief unless otherwise stated.

and determines that there is a need for such housing." [18]

(3) Even the Housing and Home Finance Agency, in a contemporaneous construction of § 106(g) as it appeared in various bills then under consideration, stated that it:

> "Prohibits *construction* of hotels and transient housing without certain prior analysis." [19]

(4) Both the Senate and House Committee reports stated that the purpose of the survey provision was to:

> "Prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing." [20]

The unambiguous legislative history of § 106(g) proves beyond question that Congress intended to amplify the long standing policy of the housing acts by preventing *construction* of hotels in all federally subsidized urban renewal areas, unless a survey of the area specifically indicated a need for additional hotels. The act was intended to remedy existing abuses of the urban renewal program. It was to apply prospectively, but immediately, and to require such a survey

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[18] Sen. Rep., Section-by-Section Summary of the Provisions of S. 57 as Agreed to in Conference, Committee Print, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 11 (1959).

[19] "Housing and Home Finance Agency, Comments on Numbered Items in Agenda of Senate Committee on Banking and Currency Relating to Housing Act of 1959 (S. 57, S. 612, S. 2378, 86th Congress)." IV-3 (July 23, 1959).

[20] Sen. Rep. No 715, 86th Cong., 1st Sess, 20 (1959); H.R. Rep. No. 1040, 86th Cong., 1st Sess., 18 (1959).

as a precondition to all future hotel constructions. It is this elementary survey which respondent has failed to procure in the instant case, and which, if made, admittedly would indicate that a surplus of hotels exists within the Pittsburgh area.

c. The Lower Court's Reliance on Comity Does Not Affect the Importance of the Issue

The Third Circuit used language, be it dictum or holding, which indicated that § 106(g) should be interpreted literally so as not to be applicable to previously approved plans containing the "commercial" boiler-plate reference to a hotel. We believe that fairly construed, the 1955 Pittsburgh renewal plan did not contain a "provision permitting the new construction of hotels." But beyond that, the Third Circuit's reading of the statute, to regulate only the inclusion of *provisions* for hotels in urban renewal *plans* inflates a technicality and exalts text over context. Congress was not promoting urban renewal *plans*, but rather urban *renewal*; it was not concerned with *provisions* for hotel construction, but with hotel *construction*.

The Third Circuit itself conceded that the application of the safeguard of § 106(g) which the plaintiffs there requested would have been "wise", but stated that it had been presented with no legislative history to support the "wise" position.[20a] That legislative sup-

[20a] The court stated: "Although the subsection requiring a survey does not specifically restrict the words 'no provision' to future ones only, and it might be wise to employ the safeguard of that subsection here, in the absence of reliable indicia showing a Congressional intent that the words include past approved ones, the subsection is not to be applied retroactively, that is applied to urban renewal plans containing a provision permitting the construction of a transient housing unit which had been approved before the effective date of the 1959 Act." (App. C, p. 10a).

port was abundantly presented in the court below, and some of it is cited herein, pp. 18-20, *supra*. It would thus have been difficult if not impossible for the Court of Appeals for the District of Columbia Circuit to agree with the views of the Third Circuit with the Housing Administrator before it and in the face of the clear legislative history presented. But the court did not reach the merits, accepting instead the Third Circuit's language on the basis of comity rather than independent agreement. We believe there was no basis for the application of comity and the court below did not pay appropriate regard to its special position as the principal court having jurisdiction over the Government official whose action was challenged. But even if we assume the decision properly to have accorded comity to the Third Circuit decision, this Court should now take up the matter and establish the law lest "the indiscreet action of one court . . . become a precedent, increasing in weight with each successive adjudication, until the whole country [is] tied down to an unsound principle." *Mast, Foos & Co.* v. *Storer Mftr. Co.*, 177 U.S. 485, 488 (1900). As this Court has stated, "comity comes in play and suggests a uniformity of ruling to avoid confusion, *until a higher court has settled the law.*" (*Id.* at 488-489).

The pattern revealed by this case is similar to that of a great many other urban renewal projects approved before enactment of Section 106(g) in 1959, and not yet completed. The considerations are the same whether the urban renewal plans involved are, in the words of the HHFA table, still "In planning" or whether they are, as the Pittsburgh plan, "In execution".

It is imperative at this early juncture in the development of the federal urban renewal program that this Court settle the law and compel respondent to honor the intent of Congress by assisting the creation of residential housing, not hotels. This Court should pronounce authoritatively whether the HHFA, despite the long standing Congressional policy and the clear intendment of § 106(g), is free at will to finance surplus hotel construction that will compete with existing adequate facilities in the great number of communities affected by the decision below, or whether it must obey Congress's demand for a prior independent survey of need in such cases.

II

THE RULING ON STANDING TO SUE PRESENTS A CONFLICT WITH RULINGS OF THIS COURT AND THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The court below affirmed the order of the District Court dismissing the complaint "on the ground that the court lacks jurisdiction over the subject matter in that plaintiffs lack standing to sue." (App. B, p. 3a). This decision, we submit, is in conflict with the decision of this Court in *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916), and with the decision of the United States Court of Appeals for the Second Circuit in *Garl* v. *Cole*, 263 F. 2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959). For the ruling below denies judicial review to those who are admittedly injured by respondent's disregard of a procedure inserted into the Housing Act for their especial protection.

Section 106(g) mentions only hotels, and its terms alone would indicate that it was intended to benefit

and protect hotels. That is the fact. In 1956,[21] in 1958,[22] and again after the *Taft* case in 1959,[23] representatives of the American Hotel Association described to Congress the industry problems resulting from the subsidized construction of surplus hotel rooms. It was pointed out that a hotel is essentially a single-purpose building, so that, unlike other commercial establishments, it cannot be used in a variety of ways depending on competition and need. The hotels petitioned for some form of protection under the Housing Act, and suggested the survey requirement that became § 106(g).

It cannot be denied that petitioners are among the class for whose especial benefit § 106(g) was passed. Indeed, HHFA has repeatedly recognized this to be

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[21] Hearings on H.R. 10157, The Housing Act of 1956 before the House Committee on Banking and Currency, 84th Cong., 2d Sess., 432, 434 (May 18, 1956).

[22] Hearings on the Housing Act of 1958 before the Subcommittee on Housing of the House Committee on Banking and Currency, 85th Cong., 2d Sess., 740 (1958); Hearings on Various Bills to Amend the Federal Housing Laws before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 2d Sess., 451 (1958).

[23] Hearings on the Housing Act of 1959 before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 1st Sess., 705 (1959); Hearings on Various Bills to Amend the Federal Housing Laws before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 754 (1959); Hearings on the President's Message Disapproving S. 57, The Housing Act of 1959 before a Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 577 (1959).

the fact.[24] Admittedly, too, petitioners will suffer serious and irreparable injury as a result of respondent's unlawful conduct. Thus, all the requirements of standing to obtain judicial review are present. For this Court stated in the *Rigsby* case, that a "disregard of the command of the statute . . . [which] results in damage to one of the class for whose especial benefit the statute was enacted" is grounds for judicial review. (241 U.S. at 39). Yet the court below has rendered a decision completely contrary to this rule.

Moreover, insofar as it deprives petitioners of judicial review of respondent's noncompliance with Housing Act procedures, the decision below also conflicts with the decision of the Court of Appeals for the Second Circuit in *Gart* v. *Cole*, 263 F. 2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959). In the *Gart* case, property owners and business tenants displaced by an urban renewal project claimed the right to a hearing before respondent on the feasibility of the relocation plan. The Second Circuit held that the appellants there "*do have standing in this action* to challenge the Administrator's refusal to grant them an oral hearing on the feasibility of the City's relocation plan." (263 F. 2d at 250).

Thus, in its refusal even to examine petitioners' contentions, the court below has rendered a ruling con-

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[24] Attachments to Items in Conference Agenda, Supplemental Statements of HHFA on Administration Positions, Agenda Item No. 48, "Special Provisions to Restrict Hotel Construction on Urban Renewal Sites," (June 1959); Statement of Robert C. Weaver, Administrator, Housing and Home Finance Agency, Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 44 at 126 (April 24, 1961).

trary to the decisions of this Court and the Second Circuit, and has denied petitioners the judicial review to which they are entitled.[25]

The decision below will profoundly affect the growth and direction of our country's urban renewal program. It also affects the ability of respondent, an administrative officer who commands vast power and wealth, to escape the restraint of judicial review. It is manifestly important that the law concerning respondent's power to approve and subsidize hotel construction in urban renewal areas be authoritatively settled.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted.

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Dated: January 28, 1964.

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[25] Petitioners stress the fact that they asked the court below to compel respondent to comply with a simple *procedure* required by statute. Petitioners did not ask the court to review an intricate *substantive* decision made by respondent in the exercise of his administrative discretion. The distinction between standing to enforce statutory procedures and standing to review substantive decisions was drawn by respondent in another case in an attempt to defeat plaintiff's claimed right to judicial review of a substantive decision. Respondent there acknowledged that strong arguments exist in favor of recognizing standing to compel compliance with a statutory *procedure*. HHFA Brief in Opposition to Petition for Certiorari, p. 13, *Harrison-Halsted Community Group* v. *HHFA*, No. 861, October Term, 1962.

APPENDIX

APPENDIX A

Opinion of the Court of Appeals in the Instant Case

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,987

HILTON HOTELS CORPORATION, ET AL., APPELLANTS

v.

ROBERT C. WEAVER, Administrator of the Housing and Home Finance Agency, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided November 18, 1963

Before WASHINGTON, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: This case raises issues of fact and law virtually identical to those which were considered by the Court of Appeals for the Third Circuit in *Pittsburgh Hotels Association, Inc.* v. *Urban Redevelopment Authority of Pennsylvania*, 309 F.2d 186 (1962), cert. denied, 372 U.S. 916 (1963). The parties there were substantially the same as those now before us, though relief here is sought against a Federal official, and there was sought against private parties and state officials. If the present appellants had obtained in the Third Circuit the relief they there sought, the controversy would have been effectively concluded. We are satisfied that in the interests

of comity and the orderly administration of justice[1] we should not attempt to reexamine the matters considered and resolved by the Third Circuit, a court having authority equal to our own. The order of the District Court, dismissing the complaint, will therefore be

Affirmed.

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[1] We need not decide whether the principles of res judicata and collateral estoppel operate to prevent a plaintiff from raising issues against a defendant who was not a party in a previous litigation in which plaintiff unsuccessfully raised the same issues. We decide only that where a prior decision against the plaintiff on the same issues he raises in the instant case would necessarily be frustrated or obstructed by a present decision in the plaintiff's favor this court will not interefere with the prior decision adverse to the plaintiff.

APPENDIX B

Order of the District Court in the Instant Case

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 317-63

HILTON HOTELS CORPORATION
ALLEGHENY HOTEL CORPORATION
SHERATON MIDCONTINENT CORPORATION, *Plaintiffs*

v.

ROBERT C. WEAVER, Administrator of the
Housing and Home Finance Agency, *Defendant*

Order

The motion of defendant to dismiss this action came on to be heard by the Court on April 23, 1963. After a consideration of the written memoranda and oral arguments of counsel, and for the reasons fully set forth in the case of *Pittsburgh Hotels Ass'n, Inc.* v. *The Urban Redevelopment Authority of Pittsburgh*, 309 F.2d 186 (3rd Cir.

1962), a case involving the same facts and legal issues as are present in the instant case, it is by the Court this 24th day of April, 1963,

ORDERED, That the motion of defendant to dismiss on the ground that the court lacks jurisdiction over the subject matter in that plaintiffs lack standing to sue, be and the same is hereby granted.

/s/ LUTHER W. YOUNGDAHL
Judge

APPENDIX C

Opinion of United States Court of Appeals for the Third Circuit in Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

PITTSBURGH HOTELS ASSOCIATION, INC., a Pennsylvania Corporation; CARLTON HOTEL CORPORATION, a Pennsylvania Corporation; HILTON HOTELS CORPORATION, a Delaware Corporation; ALLEGHENY HOTEL CORPORATION, a Pennsylvania Corporation; PITTSBURGHER HOTEL COMPANY, a Pennsylvania Corporation; and SHERATON MID-CONTINENT CORPORATION, a Delaware Corporation, *Appellants*,

v.

THE URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, a Pennsylvania Corporation, and LEON FALK, JR., JOSEPH S. WOHL and GOLDEN TRIANGLE MOTOR HOTEL, INC., a Pennsylvania Corporation, and the CITY OF PITTSBURGH, PENNSYLVANIA, *Appellees*.

GANEY, Circuit Judge.

Six plaintiffs, a hotel association and five corporations which own and operate hotels in Pittsburgh, Pennsylvania, brought an action allegedly under the Housing Act of

1949,[1] 63 Stat. 413, as amended, 42 U.S.C.A. § 1441 et seq., to enjoin Golden Triangle Motor Hotel, Inc., from erecting a hotel on a parcel of land in an officially designated redevelopment area in the City of Pittsburgh until that city "has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof determined that there exists in the area a need for additional units of such housing." The complaint avers that the plaintiffs' hotel business will be adversely affected by the operation of the proposed motor hotel since there is no need now or in the foreseeable future for such a unit in that area. The defendants are the Urban Redevelopment Authority of Pittsburgh ("Authority"), Leon Falk, Jr., Joseph S. Wohl, Golden Triangle Motor Hotel, Inc., and the City of Pittsburgh, Pennsylvania.[2]

On January 3, 1952, a contract between the United States, acting through the Federal Housing Administrator, and the Authority was executed. Under the terms of the contract the United States agreed to make an advancement not to exceed $71,700 to the Authority for the purpose of making surveys and plans in preparation for a redevelopment project in the City of Pittsburgh. Apparently, in accordance with the provisions of the Pennsylvania Urban Redevelopment Law of 1945, P.L. 991, as amended, 35 P.S. § 1701 et seq., the City Planning Commission of Pittsburgh completed a plan dated June 7, 1955, for the proposed redevelopment of an area in the Lower Hill district of the City. The area encompasses 46 city blocks and the project is designated as the Lower Hill Redevelopment Project Redevelopment Area No. 3 ("Proj-

[1] This statute was enacted to permit the Federal government to make grants and loans to aid municipalities in slum clearance and community redevelopment.

[2] Diversity of citizenship does not exist between all of the plaintiffs and all of the defendants.

ect"). The Plan divides the land into commercial, cultural, recreational, educational, residential, parking and open area, and designates the location of streets. Parcel "B" on the Plan contains approximately 5.3 acres abutting Fifth Avenue and Liberty Crosstown Thorofare. This parcel is designated for commercial use and had four streets running across it. One of them is named Chatham Street which was 60 feet wide and was to be used as a public thoroughfare.

The Plan contains a provision that the redeveloper shall devote the land to uses specified in the Plan for such area. The word "Hotel" is listed under the permitted buildings to be erected in the area designated as commercial.[3] Another provision limits the height of any building or structure to be constructed thereon to two stories or twenty feet. Part J of the Plan provides that "This Plan may be modified at any time upon approval of such modification by the Council of the City of Pittsburgh, the City Planning Commission of the City of Pittsburgh and the Urban Redevelopment Authority of Pittsburgh . . . ." The Plan was approved by Council of the City of Pittsburgh on July 13, 1955, by Ordinance No. 255.

On August 2, 1954, the Housing Act of 1949 was amended by the Housing Act of 1954, 68 Stat. 590, which authorized the establishment of an urban renewal fund and the grant of monies from that fund for certain specific purposes in accordance with the laws involved and the regulations of the Federal Housing Administrator. Section 312 of that Act, 68 Stat. 629, 42 U.S.C.A. § 1450 note, provides that the Administrator "with respect to any project covered by any Federal aid contract executed, or prior approval granted, by him under said title I before the effective date of this Act, upon request of the local public agency, shall

[3] Part F. 2b(2) (a) of the Redevelopment Area Plan for Redevelopment Area #3.

continue to extend financial assistance for the completion of such project in accordance with the provisions of said title I in force immediately prior to the effective date of this Act."

On October 11, 1955, the Authority entered into a grant and loan Contract with the United States. The Contract sets forth that "The purpose of the contract is to provide for the extension by the federal government to the Authority of financial assistance under the Housing Act of 1949, as amended prior to the enactment of the Housing Act of 1954, with respect to the project", and states the terms and conditions upon which such assistance will be extended and the understandings of the parties to the Contract as to the manner in which they contemplate that the Project will be undertaken and carried out. The Contract also provides that the Plan was satisfactory to the Federal Government, and recognized that amendments to the Plan would be made from time to time in conformity with applicable law and the provisions of the Contract, and that the Federal Government agrees to grant and loan money to the Authority to enable it to make Project land available for redevelopment for uses in accordance with the Plan. From time to time there were a number of waivers and amendments to the Contract, and several modifications to the Plan.

Amendments were made to both the Housing Act of 1949 and 1954 by the Act of September 23, 1959, 73 Stat. 654, known as the Housing Act of 1959. Section 410 of that Act; 42 U.S.C.A. § 1456(g), amended § 106 of the Housing Act of 1949, 63 Stat. 413, by adding the following subsection:

> "(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this subchapter shall be included in the urban renewal

plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."[4]

By Modification No. 2, approved by Council of the City of Pittsburgh on September 27, 1960, Chatham Street was removed from Parcel "B" of the Plan.

In November 1960, Leon Falk, Jr., and Joseph S. Wohl, private redevelopers, made a proposal to the Authority for a six month option to enter into a 99 year lease for the purpose of redeveloping Parcel "B" "with an eight-story motor hotel in excess of twenty feet in height." Later Falk and Wohl formed a corporation known as Golden Triangle Motor Hotel, Inc., for the purpose of exercising the option and developing the parcel of land in question. On June 8, 1961, a six month option contract was signed by the Authority and Golden Triangle Motor Hotel, Inc. The Federal Government has approved the proposed redevelopment of Parcel "B" by means of the construction of the motor hotel. Neither the City of Pittsburgh nor the Authority has caused to be made an independent analysis or a survey of the local existence of transient housing facilities for the purpose of determining the need for the proposed motor hotel.

On July 31, 1961, the six plaintiffs brought the action here involved. The above option was to have expired in November of 1961, but repeated extensions necessitated by the litigation have been granted. The Federal Government has consented to the extensions. On September 7, 1961, defendants moved for summary judgment on the

[4] Prior to this addition, there was no provision in the law requiring a preliminary survey with regard to urban renewal plans.

grounds that (1) plaintiffs had no standing to maintain the action, (2) that the statute relied upon by plaintiffs was not applicable, and if it were, that statute could not be applied constitutionally to this project. After a number of hearings, the District Court for the Western District of Pennsylvania on February 14, 1962, ordered that summary judgment be entered in favor of defendants and that the complaint be dismissed. 202 F.Supp. 486. From this order plaintiffs have appealed.

We agree that the dismissal of the complaint was proper. The Housing Act of 1949, as amended prior to the effective date of the Housing Act of 1959, did not give the plaintiffs standing to sue in this action.[5] Taft Hotel Cor-

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[5] Section 9 of the Pennsylvania Urban Redevelopment Law, 35 P.S. § 1709, provides: "An Authority shall constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof, which powers shall include all powers necessary or appropriate to carry out and effectuate the purpose and provisions of this act * * *:". Despite this broad language, the Supreme Court of Pennsylvania has ruled that: "The Redevelopment Authorities are purely administrative bodies enjoying no important power which is not subject to the approval of the city council or the county commissioners; the Authorities cannot independently exercise any municipal functions. Moreover, they are public bodies and not special commissions or private corporations within the meaning of the constitutional prohibition [of the Commonwealth]." See Belovsky v. Redevelopment Authority of Philadelphia et al., 357 Pa. 329, 343, 54 A.2d 277, 172 A.L.R. 953 (1947).

One of the items listed under § 9 as subsection (q) is "To sue and be sued." But giving consent to be sued does not confer jurisdiction upon a Federal district court over a controversy involving the Authority.

Plaintiffs do not claim that the Housing Act of 1949, as amended, is unconstitutional. They do not seek to restrain the enforcement of a Pennsylvania statute as being unconstitutional on its face (which would have required the convention of a three-judge statutory court), or seek to restrain the action of State officers who are enforcing a State statute in an unconstitutional manner. Nor do they assert that the enforcement of State law deprives them of due process of law or denies them the equal protection of the laws.

poration v. Housing and Home Finance Agency, 162 F. Supp. 538 (D.C. Conn. 1958), aff'd. per curiam 262 F.2d 307 (C.A. 2, 1958); Gart v. Cole, 166 F.Supp. 129 (D.C. S.D. N.Y. 1958), aff'd 263 F.2d 244, 250 (C.A. 2, 1958). Nevertheless, plaintiffs maintain that subsection (g) of § 410 of the Housing Act of 1959, 42 U.S.C.A. § 1456(g), by implication, if not in terms, gives them a standing to sue for the matters averred in the complaint. On the other hand, defendants argue that we need not consider the effect of that subsection because, as allowed by § 312 of the Housing Act of 1954, the Authority requested the Administrator to continue to extend financial assistance in accordance with the provisions of the laws in force immediately prior to August 2, 1954, and hence the Authority is not governed by and need not comply with the 1959 amendments. Even assuming that the granting of advancements for the preparation of the Plan, amounted to "prior approval granted" by the Administrator under § 312 of the 1954 Act, we need not rule whether such prior approval and the request by the Authority had the effect claimed by defendants,[6] because subsection (g) of § 410 does not, in our opinion, give plaintiffs a standing to sue in the action here involved. However, even if it did so, the subsection, by its terms, does not require that a survey be made before the proposed hotel may be built on that plot of ground designated as Parcel "B" on the

[6] Prior to its final passage, the proposed amendments had contained a provision directing the Federal Housing Administrator to amend existing contracts between the Government and the local urban renewal authorities in order to bring such contracts into conformity with changes set forth in the proposed amendments. Since the Committee on Banking and Currency understood that existing law permitted those contracts to be amended to incorporate the provisions of the proposed Act, the above proposed provision was deleted. See S.Rep. No. 924, Sept. 8, 1959, 86th Cong., 1st Sess., 1959 U.S.Code Cong. and Adm.News, p. 2846. Moreover, on this point the Federal Housing Administrator should be heard, but he is not a party to the action.

Plan. The subsection does not prevent all future new construction of hotels or other housing for transient use unless a survey is made. It simply provides that *no provision* permitting such construction shall be included in the *urban renewal plan* unless it is determined that there is a need for such construction after an independent survey of the local supply has been made. Although the subsection requiring a survey does not specifically restrict the words "no provision" to future ones only, and it might be wise to employ the safeguard of that subsection here, in the absence of reliable indicia showing a Congressional intent that the words include past approved ones, the subsection is not to be applied retroactively, that is applied to urban renewal plans containing a provision permitting the construction of a transient housing unit which had been approved before the effective date of the 1959 Act. This is the usual statutory interpretation. See Peony Park v. O'Malley, 223 F.2d 668, 671-672 (C.A. 8, 1955), cert. den. 350 U.S. 845, 76 S.Ct. 87, 100 L.Ed. 753. The requirement of a survey and a determination of the need for such transient housing unit applies only to urban renewal plans having no provision for that unit which had been approved prior to the effective date of the 1959 Act. Here, there is such a provision in the urban renewal Plan officially approved on October 11, 1955. This was almost 4 years before the effective date of the Housing Act of 1959.

Plaintiffs point out that under this interpretation of subsection (g) a hotel can be built, as may be the case here, many years after the approval of the original plan when the need for such unit will be much less than it was when the provision was approved. Conceding this to be a possibility it is also possible that the need may become greater. Additionally, a radical change in the facts developed by the survey may take place even if plaintiff's interpretation were to be the accepted one. Even though, after a survey, a determination is reached that there is

need for a hotel, between the time of that determination and the actual operation of that housing unit, the need for it may likewise disappear. Moreover, as time passes, the eventuality similar to that which the plaintiffs seek to prevent here will vanish. We think Congress was aware of this eventuality when it wrote subsection (g).'

That the Plan regarding Parcel "B" was changed after the effective date of the 1959 Act by the removal of a street upon which no structure was permissible and that the height of the proposed hotel will violate a restriction set forth in the Plan does not nullify the fact that a provision permitting the construction of a hotel existed prior to the effective date of the 1959 Act. Of course, any change, no matter how slight, in the Plan is *pro tanto* a modification of the Plan. But the paragraph allowing modification of the Plan at any time is part of the provision permitting the use of the land by the construction of a hotel thereon. A point may be reached where a modification of a provision will be such as to change the provision into a new one. The changing of land marked for residential use to commercial might be one example. At what point the transition occurs we need not determine here. Suffice it to say that we think that the removal of Chatham Street and the structural height restriction did not change the provision of the Plan into a new one.

The order dismissing the complaint will be affirmed.

'In the fall of 1957, the Subcommittee on Housing held extensive hearings in many parts of the country to develop information regarding urban renewal and low-rent housing programs. The Senate Report to the proposed legislation concerning the Housing Act of 1959 states: "During consideration of housing legislation in 1957, many members of the committee became alert to the need for projecting Federal participation in both those programs into future years on a sustained and predictable basis, and with emphasis upon *local* responsibility and autonomy." (Italics supplied.) See S.Rep. No. 924, 86th Cong., 1st Sess. (Sept. 8, 1959), 1959 U.S.Code Cong. and Adm.News, p. 2845.